Filed 3/18/19 P. v. Fix CA3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Mono)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM EVERETT FIX, Defendant and Appellant.	C083934 (Super. Ct. No. MFE16004506)

A jury convicted defendant William Everett Fix of elder abuse and contempt of court with a prior contempt conviction involving violence. The trial court sentenced him to two years in county jail.

Defendant now contends the trial court (1) committed instructional error and failed to obtain specific findings regarding the alleged prior contempt conviction involving violence, and (2) committed sentencing error. We agree with the parties that the trial court should have given the jury an additional instruction and additional verdict forms, but we conclude the error was harmless. In addition, there was no sentencing error. Accordingly, we will affirm the judgment.

BACKGROUND

Defendant met Jenny Bouwman at a birthday party and began dating. When they met, Bouwman was 68 and defendant was 47. Defendant became Bouwman's caretaker after a hip surgery and he lived with her part time. But when defendant destroyed part of

Bouwman's house, she obtained a restraining order against him. The order allowed peaceful contact by phone or e-mail but no personal contact, and it prohibited defendant from coming within 100 yards of Bouwman, her home, or her workplace. A sheriff's deputy served defendant with the restraining order in December 2013, and it expired in February 2018.

Despite the restraining order, Bouwman invited defendant over and allowed him to stay at her home. They argued a lot, and on New Year's Eve in 2014 defendant went "bananas" at Bouwman's house. He threw things, broke mirrors, and hit her with a jar of peanut butter. The next morning when she told him to leave he threatened to throw her television out the window. She called the police and defendant was convicted of elder abuse and contempt of court.

Nevertheless, defendant continued to spend time with Bouwman and sometimes stayed at her home. In September 2015, a witness heard defendant say to Bouwman, "If you don't shut your fucking mouth, I am going to smash your fucking skull." The witness intervened and believed defendant would have hurt Bouwman if he had not been there. The witness called the police and defendant pleaded no contest to contempt of court.

On two separate occasions in October 2015, Officer Grant Zemel responded to Bouwman's house. Each time defendant was at the home. The first time, Zemel advised defendant about the no contact order, cited him, and released him. On the second call, Zemel arrested defendant.

In May 2016, after defendant was released from jail, he asked Bouwman if he could stay with her for a few days. He ended up staying for a month, during which time they argued a lot. One evening, after they had argued, Bouwman woke up to defendant strangling her. He told her, "I'm always going to be hurting you and you will never get rid of me." Bouwman was able to get free from defendant, ran downstairs, and called the police.

Officer Zemel again responded to the scene, and defendant admitted he knew there was a restraining order in place. He denied grabbing Bouwman's throat, but later acknowledged there was a "good chance" he grabbed her by the neck to protect himself.

An information charged defendant with contempt of court and alleged a prior contempt conviction involving violence (Pen. Code, § 166, subds. (a)(4), (c)(4) -- count I),[1] misdemeanor elder abuse, (§ 368, subd. (c) -- count II), and misdemeanor domestic battery (§ 243, subd. (e)(1) -- count III). The jury found defendant guilty of contempt and elder abuse but not domestic battery. Prior to sentencing, the trial court granted defendant's motion to reduce his felony count I contempt conviction to a misdemeanor. (§ 17, subd. (b).) The trial court sentenced him to 365 days in county jail for contempt, plus a consecutive 365 days in county jail for elder abuse.

DISCUSSION

I

Defendant contends the trial court committed instructional error and failed to obtain specific findings regarding the alleged prior conviction involving violence. The People agree there was error but argue it was harmless. We agree with the People.

A

In an off-the-record discussion, the parties agreed to the instructions given. While discussing the verdict forms, the prosecutor asked, "Are we treating the prior restraining order violation and the use of force as a separate allegation in Count I that they have to separately find true?" Defense counsel stated, "And my proposal is Count I guilty, not guilty." The trial court proposed: "Count I would be all three elements. There is violation of restraining order, there's the seven years [*sic*] prior conviction, and there's the threat of violence. Lesser included in Count I is just violation of restraining order."

---

[1] Undesignated statutory references are to the Penal Code.

The judge said he would instruct the jury that if it "find[s] all the elements for one, you don't do the lesser included and vice versa." The parties agreed to the trial court's proposal.

On count I, the trial court instructed the jury with a slightly modified version of CALCRIM No. 2701, "Violation of Court Order: Protective Order or Stay Away (Pen. Code, §§ 166(c)(1), 273.6)." The instruction stated, in pertinent part: "The defendant is charged in Count [I] with violating a court order in violation of Penal Code section 166(c). [¶] To prove the defendant is guilty of this crime, the People must prove that: [¶] 1. A court lawfully issued a written order that the defendant have no personal contact with Jenny Baumann [*sic*]; [¶] 2. The court order was a protective order; [¶] 3. The defendant knew of the court order; [¶] 4. The defendant had the ability to follow the court order, issued under Family Law section 6200 et seq.; [¶] AND [¶] 5. The defendant willfully violated the court order."

The trial court also instructed with a modified version of CALCRIM No. 2703, "Violation of Court Order: Protective Order or Stay Away -- Act of Violence (Pen. Code, §§ 166(c)(4), 273.6(d))," which stated in pertinent part: "If you find the defendant guilty of violating a court order, you must then decide whether the People have proved that the defendant was convicted of violating a restraining order within the past seven years and that defendant's conduct involved an act of violence or a credible threat of violence. [¶] . . . [¶] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved."

In addition, the trial court told the jury: "This is a special instruction I am going to give you regarding what's called a lesser included offense. Go off the script a little bit and talk to you about that. Count I has two aspects to it, one violation of a Court order and then the next page reads if you find a violation of a Court order and you also find a prior conviction within seven years and an act of violence or credible threat of violence,

then that's guilty of Count I. [¶] However, if you find violation of Court order but cannot find that there was a prior conviction within seven years and a credible act of violence or act of violence [*sic*], then you would only find for the lesser included offense, lesser included being the violation of restraining order only without the additional elements of the prior conviction within seven years and the act of violence or credible threat of violence. So on the verdict forms you will receive you will receive a guilty and not guilty form for each of the three offenses and you will also receive as to -- for Count I a lesser included verdict form." A written version of these comments were not included in the packet of instructions given to the jury.

The judge then instructed the jury with a modified version of CALCRIM No. 3518 as follows: "If all of you find that the defendant is not guilty of a greater charged crime, you may find him guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct. [¶] Now I will explain to you which charges are affected by this instruction: [¶] A violation of Penal Code § 166(a)(4) is a lesser crime of Penal Code § 166(a)(4) and § 166(c)(4) as charged in Count I." The trial court told the jury how to fill out the verdict forms and reiterated, "whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise."

The Bench Notes to CALCRIM No. 2703 say the court must provide the jury with a verdict form on which the jury will determine if the prosecution has or has not proved the allegation, and must also instruct with CALCRIM No. 3100[2] unless defendant has

---

[2] CALCRIM No. 3100 provides: "If you find the defendant guilty of a crime, you must also decide whether the People have proved the additional allegation that the defendant was previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibit[s] _____ <*insert number[s] or description[s] of exhibit[s]*>. You must decide whether the evidence proves that the

stipulated to the prior conviction. The Bench Notes to CALCRIM No. 3100 state the trial court must provide the jury with a verdict form on which to indicate the prior conviction has been proved.

The jury was given guilty and not guilty verdict forms. The guilty verdict form for count I stated: "We, the jury in the above-entitled action find the defendant, WILLIAM EVERETT FIX, Guilty of Count I of the Information, to wit: Violation of Section 166(a)(4) and 166(c)(4) of the Penal Code (Contempt of Court), Laws of the State of California, on or about the 13th day of June, 2016." The jury was also given guilty and not guilty verdict forms for the "lesser included" offense of count I, contempt of court as a misdemeanor. (§ 166, subd. (a)(4).) Although defendant claims the jury was not provided the verdict forms for the "lesser included offense," those forms are part of the appellate record.

B

The People agree with defendant that the trial court should have instructed the jury sua sponte with CALCRIM No. 3100, and that it should have provided verdict forms where the jury could indicate its findings on the prior conviction involving violence allegations. But the People claim the error was harmless.

---

defendant was convicted of the alleged crime[s]. [¶] The People allege that the defendant has been convicted of: [¶] [1.] A violation of _____ <*insert code section alleged*>, on _____ <*insert date of conviction*>, in the _____ <*insert name of court*>, in Case Number _____ <*insert docket or case number*>(;/.) [¶] [AND <*Repeat for each prior conviction alleged*>.] [¶] [Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime[s] alleged [or for the limited purpose of _____ <*insert other permitted purpose, e.g., assessing credibility of the defendant*>]. Do not consider this evidence as proof that the defendant committed any of the crimes with which he is currently charged or for any other purpose.] [¶] [You must consider each alleged conviction separately.] The People have the burden of proving (the/each) alleged conviction beyond a reasonable doubt. If the People have not met this burden [for any alleged conviction], you must find that the alleged conviction has not been proved." (Original italics.)

Defendant argues the error lessened the prosecution's burden of proof and therefore prejudice should be evaluated under the *Chapman*[3] standard. The People counter that section 166, subdivision (c)(4) is a penalty provision, increasing the punishment for the offense when committed under specific circumstances. Accordingly, they argue the error should be evaluated under the *Watson*[4] standard.

We begin with defendant's claim that the trial court's errors lessened the prosecution's burden of proof. The argument rests on the premise that subdivisions (a) and (c) of section 166 define distinct substantive criminal offenses, but they do not. Section 166 defines a single offense and the provisions relating to previous convictions and threats of violence are penalty provisions. (See *People v. Muhammad* (2007) 157 Cal.App.4th 484, 492 [addressing the comparable structure in section 646.9]; see also *People v. Kelley* (1997) 52 Cal.App.4th 568, 576.)

A penalty provision is not an element of the crime. (*Muhammad*, *supra*, 157 Cal.App.4th at pp. 492, 494.) Rather, a penalty provision prescribes an added penalty to be imposed when the offense is committed under certain specific circumstances. (*Id.* at p. 492.) More particularly, penalty provisions " ' " 'focus[] on an element of the commission of the crime or the criminal history of the defendant which is not present for all such crimes and perpetrators and which justifies a higher penalty than that prescribed for the offenses themselves.' " ' " (*Id*. at pp. 492-493.) Section 166, subdivision (c)(4) is such a provision. While subdivision (a) of section 166 delineates the elements of the offense of contempt of court, subdivision (c)(4) looks to the particular criminal history of the perpetrator to establish a higher base term for the offense if committed by someone with a prior conviction for a violation within seven years and the

---

3 *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705].

4 *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

violation involves an act of violence or a credible threat of violence. (§ 166, subd. (c)(4); see *Muhammad*, at pp. 493-494.) Thus, section 166, subdivision (c)(4) is not a separate offense from section 166, subdivision (a). The instructional error did not lessen the burden of proof.

We agree with the People that the *Watson* standard of review is appropriate to evaluate the instructional error at issue here. Instructional error cannot be the basis for reversing a conviction unless an examination of the entire cause indicates the error resulted in a miscarriage of justice. (*People v. Larsen* (2012) 205 Cal.App.4th 810, 829.) To determine whether the error was prejudicial under state law, we assess whether it is reasonably probable a result more favorable to defendant would have been reached had the jury been correctly instructed, examining the entire record. (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 39.)

The evidence regarding the prior conviction was undisputed. The prosecution admitted into evidence the criminal protective order of February 2013, a January 2015 minute order and change of plea form from January 2015 showing defendant pleaded no contest to violating section 166, subdivision (a)(4), and a September 2015 change of plea form indicating defendant pleaded no contest to violating section 166, subdivision (a)(4). There was no basis to find the prior conviction allegation untrue. (*People v. Cooks* (1965) 235 Cal.App.2d 6, 14-15.)

The instructions directed the jury that to convict defendant of a violation of section 166, subdivision (c)(4), it had to find beyond a reasonable doubt that defendant willfully violated a protective order issued to protect Bouwman, that he had been convicted of violating a restraining order within the past seven years, and that his conduct involved an act of violence or credible threat of violence. The jury was told it had to find each of these beyond a reasonable doubt, and the verdict on each count had to be unanimous. The jury was directed that if it could not find a prior conviction within seven years *and* an act or credible threat of violence, then it could only convict on section 166,

subdivision (a)(4). Defendant complains the jury was not provided a written instruction to this effect, and we agree the trial court's approach was not optimal. But "[a]lthough providing written instructions is 'generally beneficial and to be encouraged,' defendant has no federal or state constitutional right to instructions in writing (*People v. Samayoa* (1997) 15 Cal.4th 795, 845), and the statutory right depends on an express request. (§ 1093, subd. (f).) Furthermore, defendant has not shown it is reasonably probable that the jury would have reached a result more favorable to defendant had it received a written copy . . . . [Citations.]" (*People v. Ochoa* (2001) 26 Cal.4th 398, 447.)

In addition, the jury was provided guilty and not guilty verdict forms for section 166, subdivision (c)(4) and section 166, subdivision (a)(4), as a lesser included offense. On the whole, these instructions required the jury to unanimously find every element of the offense and the penalty provisions beyond a reasonable doubt. The totality of the record indicates the jury unanimously found every element of the offense and the penalty provisions true. (See 6 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Judgment, § 47.) The trial court's error was harmless.

II

Defendant next contends the trial court committed sentencing error by failing to stay his elder abuse sentence under section 654, and by sentencing him to one year in jail for the contempt conviction.

A

Section 654 provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) The purpose of the statute is to prevent multiple punishments for a single act even though that act violates more than one statute; but a defendant may be punished separately for offenses that share common conduct if the defendant entertained multiple or simultaneous criminal objectives.

(*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) Whether a course of criminal conduct had one objective or more than one is a question of fact. (*Ibid*.) Trial courts have broad latitude to determine whether a defendant harbored one or more objectives and we uphold their findings on appeal if there is any substantial evidence in the record to support them. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) On review, we presume the existence of every fact the trial court could reasonably deduce from the evidence and we look at its determination in a light most favorable to the prosecution. (*Id*. at pp. 1312-1313.) When the record reasonably justifies the sentence, reversal is not warranted merely because the facts could have been reconciled differently. (*People v. Holly* (1976) 62 Cal.App.3d 797, 804.)

Defendant claims the sole act supporting the contempt and elder abuse convictions was his choking of Bouwman. But the trial court found that what occurred was not just that one act. Rather, it was a series of events. According to the trial court, there was ongoing distress and ongoing suffering. In thinking about the contempt offense and the elder abuse offense, the trial court said it believed the jury found they were distinct, and punishment could be imposed separately and independently.

The record supports the trial court's conclusion that choking was not the only act. The contempt conviction was based on the willful disobedience of the restraining order (§ 166, subd. (a)(4)), whereas the elder abuse conviction was based on the infliction of unjustifiable physical pain or mental suffering upon a person over 70 years old (§ 368, subd. (c)). Defendant committed contempt when he moved into Bouwman's home after his release from jail in May 2016. The credible threat of violence supporting the penalty provision occurred while he was choking her in the middle of the night, when he threatened he would always be hurting her and she would never be rid of him. And that harm was distinct from the mental suffering defendant inflicted upon Bouwman during the month he lived with her. As the trial court noted, his abuse was not limited to the act

of choking her, it was ongoing and pervasive. Substantial evidence supports the trial court's finding of separate objectives justifying consecutive sentences.

B

Defendant further argues the trial court erred in sentencing him to one year in jail for the contempt conviction, claiming the sentence should have been no more than six months. He is mistaken.

Although a violation of section 166, subdivision (a)(4), without more, would be punishable by a six-month term (§ 19), we have already explained that defendant's punishment was increased by section 166, subdivision (c)(4) based on his prior contempt conviction involving violence. Although his count I contempt conviction was reduced to a misdemeanor when the trial court granted defendant's section 17, subdivision (b) motion, the reduction did not eliminate application of subdivisions (c)(1) and (c)(4), which authorize imprisonment in a county jail not to exceed one year for misdemeanor contempt in this context. (§ 166, subds. (c)(1), (c)(4).)

The trial court did not err in sentencing defendant to one year in jail on the contempt conviction.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, J.

We concur:

/S/
ROBIE, Acting P. J.

/S/
HOCH, J.